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The Case for a Statutory Second Degree Felony-Murder Rule in California

In the recent case of *People v. Dillon*¹ the California Supreme Court was asked to abolish the first degree felony-murder rule.² The defendant, who had been convicted of first degree felony-murder for killing while attempting to commit robbery,³ argued that no statutory authority existed in California to compel the court to apply the first degree felony-murder rule.⁴ According to the defendant, the first degree felony-murder rule, as applied in California, was a common-law creation of the courts,⁵ and therefore, judicially abolishable.⁶ The defendant supported his call for abrogation of the first degree felony-murder rule by citing the many attacks which have been made against the legitimacy of the felony-murder doctrine by legal scholars⁷ and the disfavor expressed toward the felony-murder rule by the supreme court itself in past decisions.⁸ Nevertheless, the supreme court rejected the

1. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

2. *Id.* at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401.

3. An unlawful killing, whether intentional, negligent, or accidental, occurring during an attempt to commit robbery, is murder in the first degree in California. CALJIC No. 8.21. See also CAL. PENAL CODE §189.

4. 34 Cal. 3d at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401.

5. *Id.*

6. Common law that has no statutory basis is subject to judicial modification or abrogation. See *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 393-98, 525 P.2d 669, 676-79, 115 Cal. Rptr. 765, 772-75 (1974); *People v. Hutchinson*, 71 Cal. 2d 342, 346-48, 351, 455 P.2d 132, 135-36, 78 Cal. Rptr. 196, 199-200 (1969); *People v. Lynch*, 51 Cal. 15, 39 (1875). If a judge-made law is found to be unwise or outdated, a court is free to "exercise [its] role in the development of the common law" by abrogating that law. *People v. Aaron*, 299 N.W.2d 304, 329 (1980).

7. 34 Cal. 3d at 462, 668 P.2d at 708-09, 194 Cal. Rptr. at 401-02. One of the first criticisms leveled at the felony-murder doctrine by a legal commentator was made by Eden (Baron Auckland) in 1771. Eden characterized the doctrine as "reconciled to the philosophy of slaves." EDEN, *PRINCIPLES OF PENAL LAW* 206-10 (1771). Recent attacks have been made by LAFAYE & SCOTT, *CRIMINAL LAW* 554 (1972) (terming the doctrine as involving a "somewhat primitive rationale"); Moreland, *Kentucky Homicide Law With Recommendations*, 51 Ky. L.J. 59, 82 (1962) (characterizing the felony-murder doctrine as a "historic survivor for which there is no logical or practical basis for existence in modern law"); Packer, *The Case For Revision Of The Penal Code*, 13 STAN. L. REV. 252, 259 (1961) (noting that the doctrine is "unnecessary in almost all cases in which applied"); Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956) (admonishing that the felony-murder rule should not be expanded and questioning the deterrence justification for the rule). See also Note, 71 HARV. L. REV. 1565 (1958) (same).

8. 34 Cal. 3d at 462-63, 668 P.2d at 708-09, 194 Cal. Rptr. at 401-02. The California

call to abolish the first degree felony-murder rule, holding that the California Legislature had intended the rule to be codified in Penal Code Section 189.⁹ The court subsequently held section 189 constitutional,¹⁰ thereby precluding judicial abrogation of the first degree felony-murder doctrine in California.¹¹

A statement was made by the court in a footnote to *Dillon* which merits attention. After finding that the first degree felony-murder rule had been intended by the 1872 legislature to be codified in section 189, the court distinguished the second degree felony-murder rule as "judge-made doctrine without any express basis in the Penal Code."¹² This characterization of the second degree felony-murder rule is pure dictum because the issue whether the second degree felony-murder rule is codified in the Penal Code was not before the court in *Dillon*.¹³ This characterization of the second degree felony-murder rule is pure the *Dillon* court as judge-made law is significant, however, in two respects.

Supreme Court has criticized the felony-murder doctrine for "erod[ing] the relationship between criminal liability and moral culpability," *People v. Washington*, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965); for being "in almost all cases in which it is applied....unnecessary," *id.*; and because the doctrine "artificially imposes malice as to one crime because of defendant's commission of another [while] it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin [England]" *People v. Phillips*, 64 Cal. 2d 574, 583 n.6, 414 P.2d 353, 360 n.6, 51 Cal. Rptr. 225, 232 n.6 (1966).

9. 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408. All section references will be to the Penal Code unless otherwise noted.

10. *Id.* at 476, 668 P.2d at 718, 194 Cal. Rptr. at 411. The defendant in *Dillon* had argued, in the alternative, that should the first degree felony-murder rule be found embodied in the Penal Code, the statute constituted an unconstitutional violation of due process because it authorized a murder conviction without requiring that every element of murder be proved beyond a reasonable doubt. *Id.* at 472, 668 P.2d at 715-16, 194 Cal. Rptr. at 408-09. *See in re Winship*, 397 U.S. 358, 364 (1970). The defendant contended that because the element of malice aforethought, required to be present in every instance of murder, was conclusively presumed to exist as a result of an application of the felony-murder rule, the existence of malice aforethought in his killing had not been proved beyond a reasonable doubt. 34 Cal. 3d at 472, 668 P.2d. at 715-16, 194 Cal. Rptr. at 408-09. The supreme court rejected this argument, holding that malice aforethought, as it is conclusively presumed by the operation of the felony-murder rule, is not an element of felony-murder. *Id.* at 472-76, 668 P.2d at 715-18, 194 Cal. Rptr. at 408-11.

11. Judicial review of a statute duly promulgated by the legislature is limited to an examination of the constitutionality of the statute. *See Estate of Horman*, 5 Cal. 3d 62, 77, 485 P.2d 785, 796, 95 Cal. Rptr. 433, 444 (1971); *Factor (Max) & Co. v. Kunsman*, 5 Cal. 2d 446, 454-58, 55 P.2d 177, 181-82, (1936), *aff'd* 299 U.S. 198 (1936); *Yolo Co. v. Clogon*, 132 Cal. 265, 274-75, 64 P. 403, 407 (1901). *See generally* CAL. CONST. art. III, §3. Since the first degree felony-murder rule was found by the court to be embodied in Penal Code Section 189, and since Penal Code Section 189 subsequently was held to be constitutional, no authority existed for the court to comply with the request made by the defendant to abolish the rule. 34 Cal. 3d at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402.

12. 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. 408 n.19.

13. *Dillon* had been convicted of killing while attempting to commit robbery. Robbery is one of six felonies enumerated in Penal Code Section 189 capable of supporting a first degree felony-murder conviction. *See supra* note 3. The second degree felony-murder rule is implicated

First, the court relinquished the ability to abrogate half of the disfavored felony-murder rule by holding that the first degree felony-murder rule is codified and constitutional.¹⁴ By characterizing the second degree felony-murder doctrine as judge-made law, the court has left that portion of the rule vulnerable to judicial abolition in a future case.¹⁵ The separation of powers doctrine that precluded judicial abrogation of the first degree felony-murder doctrine in *Dillon*¹⁶ will not be a barrier to a judicial decision to abolish that portion of the felony-murder rule held to be exclusively judge-made.¹⁷ If the supreme court directly confronts the issue in a future case and confirms the dictum of the *Dillon* decision by holding that the second degree felony-murder rule is without *any* basis in the Penal Code, second degree felony-murder will become subject to abrogation at the discretion of the court.¹⁸

Second, before concluding that the first degree felony-murder rule is codified in section 189, the court thoroughly analyzed the legislative intent behind the promulgation of that statute.¹⁹ In contrast, when declaring the second degree felony-murder rule to be judge-made and without express statutory basis, the court cited the 1966 supreme court case of *People v. Phillips*,²⁰ a case in which no attempt was made by the court to discern a possible legislative intent to codify the second degree felony-murder doctrine.²¹ The *Dillon* court did not explain why the second degree felony-murder doctrine may be discarded as uncodified common law without need for a determination of whether the legislature intended to codify the rule.²² Assuming that

upon a killing in the attempt or commission of a felony not listed in Penal Code Section 189 that is inherently dangerous to human life. *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966); *People v. Williams*, 63 Cal. 2d 452, 457, 406 P.2d 647, 649, 47 Cal. Rptr. 7, 9 (1965). *Dillon* was not accused of killing during the commission of any felony other than robbery. 34 Cal. 3d at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393.

14. See *supra* note 11 and accompanying text.

15. See *supra* note 6 and accompanying text.

16. See *supra* note 11 and accompanying text. "This court does not sit as a super-legislature with the power to judicially abrogate a statute merely because it is unwise or outdated." 34 Cal. 3d at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17. See *supra* note 6 and accompanying text.

18. *Id.*

19. 34 Cal. 3d at 464-72, 668 P.2d at 710-15, 194 Cal. Rptr. at 403-08.

20. 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

21. *Id.* at 582-84, 414 P.2d at 360-61, 51 Cal. Rptr. at 232-33. The inquiry of the court in *Phillips* centered on the question whether the second degree felony-murder rule could be applied despite the lack of an express basis for the doctrine in the Penal Code, and the issue whether grand theft is a felony inherently dangerous to life. *Id.*

22. 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19. The court required less than one full sentence to relegate the second degree felony-murder rule to common-law status. The entire passage reads "...and the second degree felony-murder rule remains,

the court will entertain a request to abolish the second degree felony-murder doctrine in the near future,²³ determining whether the 1872 legislature intended to codify the rule is of critical importance. The existence of legislative intent to codify the second degree felony-murder doctrine in section 189 would preclude judicial abrogation of that rule.²⁴ The success of the analysis developed in *Dillon* to discern legislative intent to codify the first degree felony-murder rule suggests that a similar analysis also could unearth legislative intent to codify the second degree felony-murder rule. This analysis has not been undertaken

as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code (see *People v. Phillips*...and cases cited)." *Id.* The court has not undertaken to discern legislative intent to codify the second degree felony-murder rule apparently because it has not been required. In 1966, the court held in *Phillips* that the second degree felony-murder doctrine may be applied regardless of a Penal Code basis for the rule. 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232. In 1983, the supreme court cited *Phillips* for the same proposition. 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19. In the 17 years separating the two opinions, the supreme court consistently has cited *Phillips* as authority for application of the second degree felony-murder rule and has not inquired whether the legislature intended to codify the doctrine. See *People v. Poddar*, 10 Cal. 3d 750, 755-56, 518 P.2d 342, 346, 111 Cal. Rptr. 910, 914 (1974); *People v. Mattison*, 4 Cal. 3d 177, 184, 481 P.2d 193, 198, 93 Cal. Rptr. 185, 190 (1971); *People v. Ireland*, 70 Cal. 2d 522, 538, 450 P.2d 580, 589, 75 Cal. Rptr. 188, 197 (1969). Prior to *Phillips*, Penal Code Section 189 had been assumed by the court to embody the second degree felony-murder rule. No inquiry had been made, however, to discern legislative intent to codify the doctrine in that statute. See *People v. Washington*, 62 Cal. 2d 777, 780, 783, 402 P.2d 130, 133, 134, 44 Cal. Rptr. 442, 445, 446 (1965); *People v. Poindexter*, 51 Cal. 2d 142, 149, 330 P.2d 763, 767 (1958); *People v. Wright*, 167 Cal. 1, 5, 138 P. 349, 351 (1914); *People v. Milton*, 145 Cal. 169, 171-72, 78 P. 549, 550 (1904); *People v. Olsen*, 80 Cal. 122, 125-26 (1889). Although no express basis for the second degree felony-murder rule exists in the Penal Code, decisional law has established the authority from which the rule is applied. *People v. Lovato*, 258 Cal. App. 2d 290, 292, 65 Cal. Rptr. 638, 640 (1968). The court in *Phillips* appears to rely upon an uninterrupted history of second degree felony-murder convictions when characterizing the crime to be "imbedded in [California] law." 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232.

23. A trend has developed to restrict or abrogate the felony-murder doctrine. The rule has been abolished in England. See Homicide Act of 1957, 5 & 6 Eliz. II, c.11, §1. Five states, including Hawaii, Kentucky, Michigan, Iowa and Ohio, have abolished the doctrine either expressly or constructively. See HAWAII REV. STAT. §707-701; KY. REV. STAT. §507.020; *People v. Aaron*, 299 N.W.2d 304 (1980); OHIO REV. CODE ANN. §2903.04 (defining as involuntary manslaughter the death of another proximately caused by the attempt or commission of a felony); *State v. Galloway*, 275 N.W.2d 736, 738 (1979) (Iowa Supreme Court ruling that the issue of malice aforethought cannot be satisfied by proof of intent to commit the underlying felony). A plurality of the court in *Dillon* indicated an apparent willingness to abrogate the first degree felony-murder rule by approving of the reasoning employed by the Michigan Supreme Court in *People v. Aaron* when that court abolished the common-law felony murder rule of that state. 34 Cal. 3d at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402. In her concurring opinion to *Dillon*, Chief Justice Bird states "the time seems to be at hand for doing away with that portion of the 'barbaric' anachronism which we are responsible for creating" when discussing the second degree felony-murder rule. *Id.* at 494, 668 P.2d at 731, 194 Cal. Rptr. at 424. The State Public Defender of California has taken the position that the second degree felony-murder rule is uncoded in California and judicially disfavored and has indicated that in the appropriate case brought before the court by that office, abrogation of the rule will be sought. See quote on file at the *Pacific Law Journal*.

24. See *supra* notes 11 and 16 and accompanying text.

by the supreme court to date.²⁵ The *Dillon* court did not acknowledge that the 1872 legislature may have intended to codify the second degree felony-murder rule,²⁶ but proof of that intent is provided by the same arguments accepted by the court when holding that the legislature intended to codify the first degree felony-murder rule in section 189.

This author asserts that notwithstanding the current supreme court position that second degree felony-murder has no *express* basis in the Penal Code,²⁷ evidence exists that the 1872 legislature intended to codify the second degree felony-murder rule in section 189. The existence of legislative intent to codify the second degree felony-murder rule in section 189 establishes the statutory basis for the doctrine²⁸ despite the absence of express language concerning the second degree felony-murder rule in that statute. The felony-murder rule was held constitutional in *Dillon*,²⁹ therefore, the separation of powers barrier which precluded judicial abrogation of the first degree felony-murder rule in *Dillon*³⁰ similarly should preclude judicial abolition of the second degree felony-murder rule.³¹ *People v. Phillips*, cited by the *Dillon* court in support of the dictum that the second degree felony-murder rule is uncoded common law, will be shown to be authority only for the narrow proposition that the rule has no *express* basis in the Penal Code.³² The question whether the 1872 legislature *intended* to codify the second degree felony-murder doctrine in section 189 was not answered by *Phillips*,³³ thereby rendering *Phillips* only partial authority for the conclusion that the second degree felony-murder rule has no statutory basis.³⁴ As will be shown, the *Dillon* court did not

25. See *supra* note 22 and accompanying text.

26. See 34 Cal. 3d at 471-72, 472 n.19, 668 P.2d at 715, 715 n.19, 194 Cal. Rptr. at 408, 408 n.19.

27. See *Phillips*, 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232; accord 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. 408 n.19.

28. A statute embodies that which the legislature intended for the statute to embody. See *Dickey v. Raisin Probation Zone No. 1*, 24 Cal. 2d 796, 802, 151 P.2d 505, 508 (1944); accord *California Toll Bridge Authority v. Kuchel*, 40 Cal. 2d 43, 53, 251 P.2d 4, 9 (1952). See also *Friends of Mammoth v. Board of Supervisors of Mono Co.*, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1057, 104 Cal. Rptr. 761, 769 (1972)(citing *In re Application of Haines*, 195 Cal. 605, 613, 234 P. 883, 886 (1925)).

29. 34 Cal. 3d at 476, 668 P.2d at 718, 194 Cal. Rptr. at 411. See *supra* note 10 and accompanying text.

30. See *supra* note 11 and accompanying text.

31. See *supra* note 16.

32. See *infra* text accompanying notes 151-61.

33. 64 Cal. 2d at 582-84, 414 P.2d at 360-61, 51 Cal. Rptr. at 232-33. See *infra* text accompanying notes 151-63. See generally note 22 *supra* and accompanying text.

34. The court in *Dillon* may have recognized that *Phillips* is only partial authority for the conclusion that the second degree felony-murder rule is uncoded. The court was careful to characterize second degree felony-murder as having no *express* basis in the Penal Code,

rely upon the express language of section 189 when holding that the first degree felony-murder rule is embodied in that statute.³⁵ Only after an argument of inferences drawn from sources apart from the express language of section 189 was accepted did the supreme court hold that the 1872 legislature intended to codify the felony-murder rule for the felonies listed in section 189.³⁶ Express language codifying the second degree felony-murder rule in section 189 similarly should be unnecessary to prove that the rule is codified if evidence of legislative intent to codify the second degree felony-murder doctrine can be established.³⁷ That evidence is provided by the arguments made in *Dillon* [hereinafter cited as the *Dillon* analysis].

The *Dillon* analysis is comprised of the same evidence accepted by the supreme court in *Dillon* when holding that the 1872 legislature intended to codify the first degree felony-murder rule in section 189.³⁸ The *Dillon* analysis includes portions of the explanatory notes to sections 189, 192 and 455 of the original 1872 Penal Code offered by the drafters of that code [the drafters hereinafter cited as the Code Commission].³⁹ Evidence of legislative intent to codify the second degree felony-murder rule also is provided by the negative pregnant⁴⁰ construction of the involuntary manslaughter statute of the Penal Code, section 192. In the aggregate, this evidence forms an argument as

apparently reserving judgment on whether *any* basis exists in the Penal Code for the doctrine. 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

35. See *infra* text accompanying notes 147-49.

36. "We recognize from the standpoint of consistency the outcome of [the *Dillon* decision] leaves much to be desired...we [hold the first degree felony-murder rule to be codified] only by piling inference on inference..." 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

37. See *supra* note 28 and accompanying text.

38. See *infra* note 253.

39. This comment addresses the question whether the legislature intended to codify the second degree felony-murder rule. As in *Dillon* evidence of legislative intent is provided by the explanatory notes accompanying the original Penal Code drafted by the California Code Commission. Compare 34 Cal. 3d at 464-65, 467-71, 668 P.2d at 710, 712-15, 194 Cal. Rptr. at 403, 405-08 with *infra* text accompanying notes 171-91, 218-23, 245-53. "When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 has been enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature." *People v. Wiley*, 18 Cal. 3d 162, 171, 554 P.2d 881, 885, 133 Cal. Rptr. 135, 139 (1976), cited in 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

40. The construction of Penal Code Section 192 was characterized as a "negative pregnant" by the Attorney General arguing for the State of California in *Dillon*. Seeking to prove that the 1872 legislature intended to codify the first degree felony-murder rule, the Attorney General offered this construction as evidence of legislative intent to provide for the rule in a statute other than section 192. The term "negative pregnant" describes the manner in which section 192 is defined in terms of conduct the statute does not proscribe, thereby creating the inference that another statute does prohibit the conduct not covered under section 192. See 34 Cal. 2d at 470, 668 P.2d at 713-14, 194 Cal. Rptr. at 406-07. See also text *infra* accompanying notes 134-39, 192-97.

persuasive as the argument accepted by the supreme court in *Dillon* that the 1872 legislature intended to codify the second degree felony-murder rule in section 189.⁴¹ The *Dillon* court, however, did not find that the evidence presented established a statutory basis for the second degree felony-murder rule. Significantly, the court emphasized that the *listing* of felonies in section 189 limited the intent of the legislature to codify the felony-murder rule.⁴² Only felonies capable of supporting a first degree felony-murder conviction are listed in section 189;⁴³ consequently, the holding in *Dillon* is limited to a finding that the legislature intended to codify the first degree felony-murder rule.⁴⁴ Accordingly, the second degree felony-murder rule was characterized by the *Dillon* court as "judge-made law without any express basis in the Penal Code."⁴⁵ This characterization of the second degree felony-murder rule appears based upon the unsupported conclusion that the listing of felonies in section 189 is indicative of legislative intent to limit the codification of the felony-murder rule.⁴⁶ As will be shown, no evidence exists to suggest that the enumeration of felonies in section 189 was intended by the 1872 legislature to limit the codification of the felony-murder rule by that statute.⁴⁷ Consequently, the evidence developed in *Dillon*, as applied by this author in the *Dillon* analysis, strongly suggests that the 1872 legislature intended to codify the second degree felony-murder rule in section 189. This conclusion will be supported by a full discussion of the four components of the *Dillon* analysis⁴⁸ after close examination of the *Dillon* decision.⁴⁹ To establish a foundation upon which to build the *Dillon* analysis, however, two facts about the felony-murder rule as applied in California should be understood.

41. See *infra* text accompanying notes 171-253.

42. See 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

43. See *infra* text accompanying notes 59-60.

44. 34 Cal. 3d at 471-72, 668 P.2d at 715, 194 Cal. Rptr. at 408.

45. *Id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

46. As will be shown, the *Dillon* analysis provides strong evidence that the 1872 legislature intended to codify the second degree felony-murder rule. See *infra* text accompanying notes 171-253. The *Dillon* analysis is based on proof almost identical to that accepted in *Dillon*. See *infra* note 253. The court has not passed on the issue whether the second degree felony-murder rule is codified. See *supra* note 22 and accompanying text. With evidence before the court suggesting that the second degree felony-murder rule was intended to be codified and the question unresolved whether the rule is statutory, the reason the court chose to characterize the rule as "judge-made law" remains open to speculation. From the language of the *Dillon* decision, one answer appears to be that the court felt only those felonies listed in section 189 were intended by the 1872 legislature to trigger application of the felony-murder rule. See 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

47. See *infra* text accompanying notes 230-43.

48. See *infra* text accompanying notes 171-253.

49. See *infra* text accompanying notes 75-151.

FELONY-MURDER AS APPLIED IN CALIFORNIA

Underlying any discussion of the felony-murder rule is the seminal fact that malice aforethought, a statutory element of murder in California,⁵⁰ need not be proved in a prosecution for murder premised on the theory of felony-murder.⁵¹ In California, malice is conclusively presumed to have attended a killing proximately caused by the commission or attempt to commit a felony⁵² enumerated in section 189,⁵³ or a felony inherently dangerous to human life.⁵⁴ Although the existence of malice aforethought to a killing typically distinguishes murder from less culpable forms of homicide,⁵⁵ the felony-murder rule operates as an exception⁵⁶ and authorizes a defendant in California to be convicted of murder even though his act of killing was completely accidental.⁵⁷ This imbalance between the criminality of a defendant charged with felony-murder and his moral culpability has been the catalyst for most of the criticism leveled at the felony-murder doctrine.⁵⁸

50. "Murder is the unlawful killing of a human being, or fetus, with malice aforethought." CAL. PENAL CODE §187.

51. See *People v. Avalos*, 98 Cal. App. 3d 701, 718, 159 Cal. Rptr. 736, 745 (1979), cited with approval in 34 Cal. 3d at 475, 668 P.2d at 718, 194 Cal. Rptr. at 411.

52. See 34 Cal. 3d at 474-75, 668 P.2d at 717-18, 194 Cal. Rptr. at 410-11. See generally 2F. WHARTON, CRIMINAL LAW, §145 at 204 (14th ed.). The felony-murder rule relieves the burden upon the prosecution to prove a killing was accompanied by malice by force of the conclusive presumption of malice aforethought attached to the commission of the felony underlying the killing. *Id.* Compare PERKINS, CRIMINAL LAW 71 (3d ed. 1982)(characterizing the intent to commit a felony as malice aforethought).

53. See *infra* notes 59-60 and accompanying text.

54. See *Williams*, 63 Cal. 2d at 458 n.5, 406 P.2d at 650 n.5, 47 Cal. Rptr. at 10 n.5; accord, *Phillips*, 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232; *People v. Mattison*, 4 Cal. 3d 177, 184, 481 P.2d 193, 198, 93 Cal. Rptr. 185, 190 (1971). See also *People v. Poindexter*, 51 Cal. 2d 142, 149, 330 P.2d 763, 767 (1958).

55. The existence of malice aforethought to the killing is the "grand criterion" which distinguishes murder from other forms of homicide. BLACKSTONE, COMMENTARIES 198 (Hammond, ed. 1898).

56. See *supra* text accompanying notes 50-51. "In every case of murder other than felony-murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." 34 Cal. 3d at 475, 668 P.2d at 717, 194 Cal. Rptr. at 410. "The issue of malice is... 'wholly immaterial for the purposes of the proponent's case' when the charge is felony-murder." 34 Cal. 3d at 475, 668 P.2d at 717, 194 Cal. Rptr. at 410. "[T]he only criminal intent required [to be proved in the prosecution of felony-murder] is the specific intent to commit the particular felony." *People v. Cantrell*, 8 Cal. 3d 672, 688, 504 P.2d 1256, 1266-67, 105 Cal. Rptr. 792, 802-03 (1973) (disapproved on other grounds in *People v. Flannel*, 25 Cal. 3d 668, 685 n.12, 603 P.2d 1, 10 n.12, 160 Cal. Rptr. 84, 93 n.12 (1979)).

57. See *People v. Valentine*, 28 Cal. 2d 121, 135-36, 169 P.2d 1, 10 (1946); *People v. Lindley*, 26 Cal. 2d 780, 791, 161 P.2d 227, 232 (1945); *People v. Stamp*, 2 Cal. App. 3d 203, 210, 82 Cal. Rptr. 598, 603 (1969).

58. "It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class." 7A HAWAII REV. STAT., §§707-801, commentary, p.347. "The most fundamental characteristic of the felony-murder rule violates [the] basic principle [that criminal liability is not justified in the absence of proportionate criminal culpability]." *People*

Of further importance to a discussion of felony-murder in California is the difference between the way in which first and second degree felony-murder is determined. Section 189 lists six felonies that alone may support a first degree felony-murder conviction.⁵⁹ These felonies are rape, robbery, arson, burglary, mayhem, and lewd or lascivious acts with a minor under fourteen.⁶⁰ A killing without malice, proximately caused by the attempt or commission of any other felony can be, at most, second degree felony-murder in California.⁶¹ The California Supreme Court has imposed the additional limitation that the underlying felony be inherently dangerous to human life.⁶² The court has declared the following felonies to be inherently dangerous to human life: administering of narcotics to a minor,⁶³ administering of poison,⁶⁴ abortion,⁶⁵ drunk driving,⁶⁶ kidnapping,⁶⁷ and the willful burning of a motor vehicle.⁶⁸ The California Appellate Courts additionally have

v. Aaron, 299 N.W.2d 304, 317 (1980). "The modern tendency has been to oppose policy-formation such as that embodied in or extended from the felony-murder doctrine. It has insisted on a decent regard for the facts and on sanctions that represent fair evaluation of these facts and not on the supposed character of the offender." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 455 (1947). Cf. notes 7-8 *supra* and accompanying text (criticisms of the felony-murder doctrine).

59. Penal Code Section 189 enumerates certain circumstances that distinguish first degree from second degree murder. The statute acts as a degree-setting device for murder, setting at first degree those murders attended by the circumstances listed in the statute. 34 Cal. 3d at 465, 668 P.2d at 710, 194 Cal. Rptr. at 403. See also *Mattison*, 4 Cal. 3d at 182, 481 P.2d at 196, 93 Cal. Rptr. at 188. "[A]ll other kinds of murder are of the second degree." CAL. PENAL CODE §189.

60. CAL. PENAL CODE §189.

61. See *People v. Romo*, 47 Cal. App. 3d 976, 989, 121 Cal. Rptr. 684, 692 (1975). See also *People v. Ford*, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635 (1964)(distinguishing first degree from second degree felony-murder); *People v. Milton*, 145 Cal. 169, 171-72, 78 P. 549, 550 (1904)(interpreting Penal Code Section 189 as implicated upon the commission of the felonies enumerated in the statute, and every felony known to the law).

62. This limitation was imposed in recognition of the deterrence rationale behind the felony-murder doctrine which is premised on the assumption that a felon will be less likely to kill during the commission of a felony knowing that, as a result, a murder sanction will be imposed. "[This deterrence rationale] may be well served with respect to felonies such as robbery or burglary, but it has little relevance to a felony which is not inherently dangerous. If the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred. He will not anticipate that an injury or death might arise solely from the fact that he will commit the felony." *Williams*, 63 Cal. 2d at 457 n.4, 406 P.2d at 650 n.4, 47 Cal. Rptr. at 10 n.4. See also *Washington*, 62 Cal. 2d at 781, 402 P.2d at 50, 44 Cal. Rptr. at 445.

63. *Poindexter*, 51 Cal. 2d at 149, 330 P.2d at 767.

64. *Mattison*, 4 Cal. 3d at 184, 481 P.2d at 199, 93 Cal. Rptr. at 191.

65. *People v. Powell*, 34 Cal. 2d 196, 205, 208 P.2d 974, 979-80 (1949); *Wright*, 167 Cal. at 5, 138 P. at 351; *People v. Balkwell*, 143 Cal. 259, 265, 76 P. 1017, 1020 (1904).

66. *People v. McIntyre*, 213 Cal. 50, 56, 1 P.2d 443, 445 (1931). The California appellate courts have extended the rationale of *McIntyre* to find driving while under the influence of narcotics to be an inherently dangerous felony. See *People v. Calzada*, 13 Cal. App. 3d 603, 606, 91 Cal. Rptr. 912, 914 (1970).

67. *Ford*, 60 Cal. 2d at 795, 388 P.2d at 907-08, 36 Cal. Rptr. at 635-36 (1964).

68. *People v. Nichols*, 3 Cal. 3d 150, 162, 474 P.2d 673, 681, 89 Cal. Rptr. 721, 729 (1970).

held the practicing of medicine without a license,⁶⁹ the administering and furnishing of narcotics,⁷⁰ and automobile theft⁷¹ to be inherently dangerous felonies. These crimes may support a second degree felony-murder conviction. For purposes of this comment, the important distinction to be made between first and second degree felony-murder is that those felonies capable of supporting a first degree felony-murder conviction have been listed by the legislature in section 189. In marked contrast, those felonies capable of supporting a second degree felony-murder conviction have been recognized by judicial decision.⁷² One reason for this discrepancy is the lack of language in section 189 concerning any particular form of second degree murder.⁷³ The legislature has grouped in section 189 all forms of second degree murder in one catch-all phrase "...and all other kinds of murders are of the second degree."⁷⁴ The significance of the omission from the Penal Code of language concerning particular forms of second degree murder is examined later in this comment when the *Dillon* analysis is applied to evidence legislative intent to codify the second degree felony-murder rule in section 189. For present purposes, understanding these threshold concepts underlying the felony-murder rule as applied in California will aid comprehension of the issues and arguments presented in *Dillon* which will be combined later by this author to suggest that the second degree felony-murder rule is codified in section 189.

People v. Dillon

The primary issue in *Dillon* was whether the court could abolish the first degree felony-murder rule.⁷⁵ The *Dillon* court noted that the ability of a California court to abrogate a law depends upon the origin of the law.⁷⁶ If a law is promulgated by the legislature, it may be

69. *People v. Burroughs*, 141 Cal. App. 3d 386, 392, 190 Cal. Rptr. 304, 307-08 (1983), hearing granted June 23, 1983, Crim. 23125.

70. *People v. Wong*, 35 Cal. App. 3d 812, 840, 111 Cal. Rptr. 314, 334 (1973); *People v. Cline*, 270 Cal. App. 2d 328, 333-34, 75 Cal. Rptr. 459, 463 (1969); *People v. Taylor*, 11 Cal. App. 3d 57, 64, 89 Cal. Rptr. 697, 702 (1970).

71. *People v. Pulley*, 225 Cal. App. 2d 366, 373, 37 Cal. Rptr. 376, 380 (1964)(disapproved on other grounds in *Williams*, 63 Cal. 2d at 458 n.5, 406 P.2d at 650 n.5, 47 Cal. Rptr. at 10 n.5).

72. *Lovato*, 258 Cal. App. 2d at 292, 65 Cal. Rptr. at 640. See generally notes 63-72 and accompanying text (California decisions upholding second degree felony-murder convictions for felonies not listed in Penal Code Section 189).

73. See *supra* note 59. See also Fletcher, *Reflections on Felony-Murder*, 12 S.W.U.L. REV. 413, 421 (1981); Pike, *What is Second Degree Murder in California?*, 9 So. CAL. L. REV. 112, 118 (1936).

74. CAL. PENAL CODE §189. See also Fletcher, *supra* note 73 at 421.

75. 34 Cal. 3d at 462-72, 668 P.2d at 708-15, 194 Cal. Rptr. at 401-08.

76. *Id.* at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402. See generally notes 6, 11, and

abolished judicially only if found unconstitutional.⁷⁷ If, on the other hand, the law is judge-made, it is abolishable at the discretion of the court.⁷⁸ The defendant in *Dillon* contended that the first degree felony-murder rule was judge-made law in California and, therefore, judicially abolishable.⁷⁹ The Attorney General, representing the State of California, argued that the legislature had intended to codify the first degree felony-murder rule in section 189 and, as a result, the court was precluded from abrogating the rule.⁸⁰ To settle the question, the court thoroughly examined the legislative history of section 189.⁸¹ As will be shown, the examination produced conflicting evidence.

The supreme court noted in *Dillon* that the structure of section 189 has not changed since the enactment of the statute in 1872.⁸² As originally promulgated, the statute provided:

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and all other kinds of murder are of the second degree.⁸³

In support of the position advocated by the defendant that the first degree felony-murder rule was not intended to be codified in section 189, the *Dillon* court noted⁸⁴ that the Code Commission, in its note accompanying section 189,⁸⁵ explained that the section was adopted from a 1794 Pennsylvania statute acknowledged as the first legislation in the nation dividing the crime of murder into two degrees.⁸⁶

16 *supra* and accompanying text.

77. See *supra* notes 11 and 16 and accompanying text.

78. See *supra* note 6 and accompanying text.

79. 34 Cal. 3d at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401.

80. *Id.* at 468-71, 668 P.2d at 713-15, 194 Cal. Rptr. at 406-08.

81. *Id.* at 463-72, 668 P.2d at 709-15, 194 Cal. Rptr. at 402-08.

82. *Id.* at 467 n.14, 668 P.2d at 712 n.14, 194 Cal. Rptr. at 405 n.14. Penal Code Section 189 has been amended several times since its enactment to include additional circumstances of murder to which first degree punishment will attach. See 1873-74 CAL. CODE AMEND., c.614, §16, at 427 (adding the crime of mayhem); 1949 Cal. Stat., c.16 §1, at 30 (first ex. sess.) (adding the crime of child molesting); 1970 Cal. Stat., c.771, §3, at 1456 (substituted "destructive device" for "bomb"); 1981 Cal. Stat., c.404, §7, at 1593 (further defined "deliberate and premeditated"); 1982 Cal. Stat., c.949, §1, at 5039 (added "knowing use of ammunition designed primarily to penetrate metal or armor"). The statute has not been amended to clarify the function of the statute. 34 Cal. 3d at 467 n.14, 668 P.2d at 712 n.14, 194 Cal. Rptr. at 405 n.14.

83. CAL. PENAL CODE §189 (1872).

84. 34 Cal. 3d at 464-65, 668 P.2d at 710, 194 Cal. Rptr. at 403.

85. CAL. PENAL CODE ANN. §189 Code Com. note (1872).

86. 34 Cal. 3d at 464-65, 668 P.2d at 710, 194 Cal. Rptr. at 403. See generally 4 JOURNAL OF THE SENATE 242 (Pa. 1794)(enactment of the 1794 Pennsylvania statute); PERKINS, *supra* note 52 at 137; 34 Cal. 3d at 463-64, 668 P.2d at 709, 194 Cal. Rptr. at 402. Cf. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. OF PA. L. REV. 759, 771-73 (1949)(discussing the enactment of the statute).

The *Dillon* court noted that the Pennsylvania courts have interpreted the 1794 statute solely as a degree-setting device for murder, and not as a codification of the felony-murder rule.⁸⁷ Under this interpretation, murder must be proven first, independent of the degree-setting statute.⁸⁸ Only after murder is proven independently may the degree-setting statute be employed to determine the degree of the murder.⁸⁹ In other words, once murder is established by proof that an unlawful killing with malice aforethought has occurred,⁹⁰ the court will refer to the degree-setting statute to determine if any of the circumstances listed in the statute attended the murder.⁹¹ If one of the circumstances listed did attend the murder, the statute declares the murder to be of the first degree.⁹² If none of the enumerated circumstances attended the murder, the statute declares the murder to be of the second degree.⁹³ The defendant in *Dillon* argued that because section 189 had been modeled after the Pennsylvania degree-setting statute, the legislature must have intended section 189 to operate as a degree-setting device for murder and not as a codification of the first degree felony-murder rule.⁹⁴ This assertion was strengthened when the supreme court further examined the legislative history of section 189.⁹⁵

The court explained in *Dillon* that section 189 was adopted from section 21 of the first codification of the criminal law in California, "An Act concerning Crimes and Punishments,"⁹⁶ enacted in 1850 [hereinafter cited as the 1850 Act]. Penal Code section 189, as enacted in 1872, was nearly identical to section 21 of the 1850 Act as amended in 1856.⁹⁷ If a murder was found to have been committed by certain

87. 34 Cal. 3d at 464 n.9, 668 P.2d at 709 n.9, 194 Cal. Rptr. at 402 n.9. See *Commonwealth v. Redline*, 137 A.2d 472, 476 (1958); *Commonwealth ex rel Smith v. Meyers*, 261 A.2d 550, 553 (1970).

88. "[W]hen a murder is otherwise proved—to wit, an unlawful killing with malice aforethought—the statute simply fixes the degree thereof." 34 Cal. 3d at 464, 668 P.2d at 709, 194 Cal. Rptr. at 402 (the California Supreme Court interpreting the Michigan Supreme Court interpretation of the Michigan statute based on the 1794 Pennsylvania statute).

89. "Clearly this statutory felony-murder rule merely serves to raise the degree of certain murders to first degree; it gives no aid to the determination of what constitutes murder in the first place." *Commonwealth ex rel Smith v. Meyers*, 261 A.2d 550 (1970) (excerpt from a Pennsylvania Supreme Court decision in which the 1794 Pennsylvania statute was interpreted).

90. "At common law and traditionally in the United States murder is homicide committed with malice aforethought." PERKINS, *supra* note 52, at 57. See CAL. PENAL CODE §187.

91. See 34 Cal. 3d at 464-65, 668 P.2d at 709-10, 194 Cal. Rptr. at 402-03.

92. *Id.*

93. *Id.* at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402 (the California Supreme Court paraphrasing the discussion of the Michigan statute based on the 1794 Pennsylvania statute by the Michigan Supreme Court in *People v. Aaron*, 299 N.W.2d at 321-23).

94. *Id.* at 462-63, 668 P.2d at 708-09, 194 Cal. Rptr. at 401-02.

95. *Id.* at 464-68, 668 P.2d at 710-13, 194 Cal. Rptr. at 403-06.

96. *Id.* at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

97. The only variances were grammatical. *Id.*

enumerated means, or if the killing were willful, deliberate, and premeditated, or if the murder occurred during the attempt or commission of certain listed felonies, amended section 21 declared the murder to be of the first degree.⁹⁸ All other murders were declared by the statute to be of the second degree.⁹⁹ Amended section 21 was interpreted by the supreme court in 1857 as a degree-setting device for murder and not as a codification of the crime of murder in any form.¹⁰⁰ The Code Commission expressly stated in the explanatory note to section 189 that that section was based on section 21 of the Crimes and Punishments Act as amended in 1856 and that no material change in the language of section 21 was intended.¹⁰¹ The *Dillon* court drew the inference that because section 189 was based on section 21 as amended in 1856 with no material change in the language intended, section 189 could be interpreted as amended section 21 had been interpreted: solely as a degree-setting device for murder.¹⁰² The *Dillon* court rejected the argument that in 1856 section 21 embodied the felony-murder rule because the rule, the court observed, had been codified separately by the legislature in section 25 of the 1850 Act.¹⁰³

Section 25 was one of four provisions in the 1850 Act relating to the crime of manslaughter.¹⁰⁴ One function of section 25 was to declare as murder a homicide that otherwise would normally constitute no more than manslaughter if committed "in the prosecution of a felonious intent."¹⁰⁵ In this manner, section 25, acting as a proviso to the manslaughter provisions of the 1850 Act, codified the entire felony-murder rule.¹⁰⁶ Prior to the enactment of the present Penal

98. Amended section 21 provided in pertinent part:

All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilfull, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree.

1856 Cal. Stat., c.139, §2, at 219 (amending section 21 of the 1850 "Act concerning Crimes and Punishments").

99. *Id.*

100. *People v. Moore*, 8 Cal. 90, 93 (1857); *People v. Bealoba*, 17 Cal. 389, 393-99 (1861).

101. CAL. PENAL CODE ANN. §189, Code Com. note (1872). *See* 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

102. 34 Cal. 3d at 467-68, 668 P.2d at 712, 194 Cal. Rptr. at 405.

103. *Id.* at 470, 668 P.2d at 713, 194 Cal. Rptr. at 406.

104. 1850 Cal. Stat., c. 99, §§22-25, at 231 (defining the crime of manslaughter).

105. Section 25 provided in pertinent part: "Provided, that where such involuntary [sic] killing shall happen in the commission of an unlawful act, which...is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged murder." 1850 Cal. Stat., c.99, §25, at 220 (codifying the felony-murder rule).

106. *See People v. Doyell*, 48 Cal. 85, 94 (1872); *accord*, *People v. Olsen*, 80 Cal. 122, 124-27 (1889); 34 Cal. 3d at 466, 668 P.2d at 711, 194 Cal. Rptr. at 404. Death proximately caused by the attempt or commission of *any* felony would have supported a felony-murder

Code in 1872, therefore, section 25 and amended section 21 of the 1850 Act worked in tandem. If a person were killed as a result of the commission or attempt to commit a felony, section 25 declared the killing to be murder.¹⁰⁷ If the felony were one of those listed in amended section 21, the murder was declared to be of the first degree.¹⁰⁸ Death resulting from an attempt or commission of a felony not listed in section 21 was held to be murder in the second degree.¹⁰⁹ As the court noted in *Dillon*, however, this functioning of the law of homicide in California changed with the enactment of the Penal Code in 1872.¹¹⁰

All existing criminal law, including sections 21 and 25 of the 1850 Act, was repealed with the enactment of the 1872 Penal Code.¹¹¹ Much of the 1850 Act was adopted in the new Penal Code without change, including, as mentioned, section 21, which reappeared as section 189.¹¹² The *Dillon* court observed that the felony-murder language of section 25 of the 1850 Act was not reproduced in any Penal Code provision.¹¹³ From the deletion of the felony-murder language of section 25 from the 1872 Penal Code, the *Dillon* court acknowledged that the legislature apparently intended to make a substantial change in the law and, consequently, implied an intent to abolish the use of the felony-murder rule in California.¹¹⁴ Section 189 could not be said to embody the crime of felony-murder if the legislature intended to abolish the rule upon enactment of the Penal Code.¹¹⁵

The final inference drawn by the *Dillon* court in support of the eventually rejected argument advanced by the defendant that section 189 was not intended to codify the first degree felony-murder rule originated from the language of section 189. Section 189 declares "murder"¹¹⁶ committed under certain circumstances to be of the first

conviction under section 25. *Id.* See *infra* notes 200-02 and accompanying text.

107. 34 Cal. 3d at 466, 668 P.2d at 711, 194 Cal. Rptr. at 404.

108. See *Doyell*, 48 Cal. at 94-95; *Olsen*, 80 Cal. at 124-27; 34 Cal. 3d at 466-67, 668 P.2d at 711-12, 194 Cal. Rptr. at 404-05.

109. *Doyell*, 48 Cal. at 94-95; *accord*, 34 Cal. 3d at 465-67, 668 P.2d at 711-12, 194 Cal. Rptr. at 404-05.

110. 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

111. CAL. PENAL CODE §6 (reserving exclusive authority to the Penal Code to declare an act illegal and to prescribe criminal punishment). See 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

112. CAL. PENAL CODE ANN. §189, Code Com. note (1872). See 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405. See also *supra* notes 96-97, 101 and accompanying text.

113. 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

114. *Id.*

115. "It is the cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose, of the law makers." *Dickey v. Raisin Probation Zone No. 1*, 24 Cal. 2d 796, 802, 151 P.2d 505, 508, (1944).

116. Although the express language of section 189 includes the term "murder," the supreme

degree. In 1872, section 187 defined "murder" as the unlawful killing of a human being with malice aforethought.¹¹⁷ Consequently, the *Dillon* court hypothesized that because a term defined by a statute is ordinarily binding on the courts,¹¹⁸ section 189 would seem to require a killing to have occurred with malice aforethought before the provisions of that statute could operate.¹¹⁹ Section 189, interpreted in this manner, could not codify the felony-murder rule, but would act solely as a degree-setting device for murder.¹²⁰ This court-drawn inference, together with those previously discussed, combined to form a compelling argument that the first degree felony-murder rule was not intended to be codified in the Penal Code and, therefore, was judicially abolishable.¹²¹ The Attorney General, however, successfully argued for the opposite conclusion, that the supreme court was precluded from abolishing the first degree felony-murder doctrine because the legislature intended to codify the rule in section 189.¹²²

PENAL CODE SECTION 189 CODIFIES FIRST DEGREE FELONY-MURDER

The argument presented by the Attorney General was threefold. The first component involved the Code Commission note accompanying Penal Code section 189¹²³ wherein an excerpt from the supreme court opinion of *People v. Sanchez*¹²⁴ was quoted with approval.¹²⁵ The excerpt included a discussion of how to administer the degree-setting function of amended section 21 of the 1850 Act.¹²⁶ The *San-*

court often has required no more than a "killing" when invoking the proscriptions of that statute. See Note, *California Rewrites Felony-Murder Rule*, 18 STAN. L.R. 690 (1966).

117. CAL. PENAL CODE §187 (1872). The statute was amended in 1970 to include within the definition of murder the killing of a fetus with malice aforethought. 1970 Cal. Stat., c. 1311, §1, at 2440.

118. *Great Lake Properties, Inc. v. City of El Segundo*, 19 Cal. 3d 152, 156, 561 P.2d 244, 246, 137 Cal. Rptr. 154, 156 (1977); *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 638, 268 P.2d 723, 733 (1954), cited with approval in 34 Cal. 3d at 468, 668 P.2d at 712, 194 Cal. Rptr. at 405.

119. 34 Cal. 3d at 468, 668 P.2d at 712, 194 Cal. Rptr. at 405.

120. "It must be emphasized, however, that a *killing* by one of the means enumerated in [section 189] is not murder of the first degree unless it is first established that it is *murder*...Without a showing of malice, it is immaterial that the killing was perpetrated by one of the means enumerated in [section 189]." (emphasis in original). *Mattison*, 4 Cal. 3d at 182, 481 P.2d at 196, 93 Cal. Rptr. at 188, cited in 34 Cal. 3d at 465 n.11, 668 P.2d at 710 n.11, 194 Cal. Rptr. at 403 n.11. Cf. *People v. Aaron*, 299 N.W.2d 304, 322 (1980) (describing the Michigan first degree murder statute as solely a degree-setting device for murder); *Commonwealth ex rel Smith v. Meyers*, 261 A.2d 550 (1970) (describing the 1794 Pennsylvania statute as solely a degree-setting device for murder).

121. 34 Cal. 3d at 464-68, 668 P.2d at 710-13, 194 Cal. Rptr. at 403-06.

122. *Id.* at 468-71, 668 P.2d at 713-15, 194 Cal. Rptr. at 406-08.

123. CAL. PENAL CODE ANN. §189, Code Com. note (1872).

124. 24 Cal. 17, 29-30 (1864).

125. CAL. PENAL CODE ANN. §189, Code Com. note (1872).

126. "Since the enactment [of the 1794 Pennsylvania statute, of which section 189 is a

chez excerpt was included by the Code Commission in the explanatory note to section 189 to explain the degree-setting function of that statute.¹²⁷ The Attorney General, however, argued that the *Sanchez* excerpt also evidenced a *belief* by the Code Commission that section 189 codified the first degree felony-murder rule. The Attorney General emphasized the language of the *Sanchez* excerpt "where the *killing* is done in the perpetration or attempt to perpetrate some one of the felonies enumerated in [amended section 21] . . . the jury have no option but to find the prisoner guilty [of murder] in the first degree" (emphasis added).¹²⁹ The substitution of the word "killing" for "murder" may have been construed by the Code Commission as evidence that amended section 21 codified the first degree felony-murder rule.¹³⁰ The inclusion of the *Sanchez* excerpt in the explanatory note to section 189, therefore, evidenced a belief by the Code Commission that section 189 continued to codify the first degree felony-murder rule.¹³¹ No evidence was presented by the Attorney General to suggest that the Code Commission actually interpreted the *Sanchez* excerpt as indicating that amended section 21 codified the first degree felony-murder rule.¹³² Nonetheless, the court accepted the *Sanchez* excerpt as evidence of a belief by the Code Commission that section 189 embodied the first degree felony-murder rule.¹³³

The second component of the argument made by the Attorney General in *Dillon* centered upon the language of section 192 which defines the crime of involuntary manslaughter.¹³⁴ Section 192 provides: "[Involuntary Manslaughter is the] unlawful killing of a human being, without malice...in the commission of an unlawful act, *not amounting to a felony*" (emphasis added).¹³⁵ The Attorney General

copy], no subject has been the source of more patient judicial investigation than the distinction between the two degrees of murder...After all that had been written upon this topic, it remained for the Supreme Court of [California] to be the first to draw the distinction between the two degrees of murder...[See] *The People v. Vincente Sanchez*, 24 Cal., p.29..." *Id.* See 34 Cal. 3d at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406.

127. CAL. PENAL CODE ANN. §189, Code Com. note (1872). See *supra* note 126 and accompanying text.

128. 34 Cal. 3d at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406.

129. *Id.*

130. *Id.* Compare *supra* note 116.

131. 34 Cal. 3d at 469, 471, 668 P.2d at 713, 714-15, 194 Cal. Rptr. at 406, 408.

132. The Attorney General relied solely upon the language of the *Sanchez* opinion included in the Code Commission note to Penal Code Section 189 and hypothesized that the Commission had interpreted that language as depicting amended section 21 as embodying the felony-murder rule. 34 Cal. 3d at 468-69, 471, 668 P.2d at 713, 714-15, 194 Cal. Rptr. at 406, 408.

133. *Id.* at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

134. *Id.* at 469-70, 668 P.2d at 713-14, 194 Cal. Rptr. at 406-07.

135. Section 192, as enacted in 1872, provided:

Manslaughter is the unlawful killing of a human being, without malice. It is of two

argued that the qualifying language of the manslaughter statute “not amounting to a felony” should be read as a negative pregnant.¹³⁶ The language arguably implies that somewhere in the Penal Code the legislature intended to codify the felony-murder rule by making criminal the unlawful killing of a human being, without malice, *in the commission of a felony*.¹³⁷ The supreme court termed the inference “not unreasonable,”¹³⁸ but indicated that the burden remain upon the Attorney General to show which statute was believed by the Code Commission to codify the felony-murder rule.¹³⁹

The required evidence, the third component of the argument made by the Attorney General in *Dillon* was found in the explanatory note accompanying section 455,¹⁴⁰ relating to the crime of arson. The note first explains that the nine sections of the present Penal Code pertaining to arson were based on sections 4 through 6 of the repealed 1850 Act.¹⁴¹ Section 5 of the repealed 1850 Act codified arson felony-murder by declaring any death occurring as a result of arson to be murder.¹⁴² This clause was not adopted into the arson sections of the present Penal Code. The note explains the omission as intentional, characterizing the language as “surplusage, *for the killing in the case is in the perpetration of arson, and falls within the definition of murder in the first degree. —See section 189, ante*”¹⁴³ (emphasis added). The Attorney General argued that the deletion of the felony-murder language from the arson sections of the Penal Code evidenced that the Code Commission believed that section 189 codified arson felony-

kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.
2. Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

Id.

136. 34 Cal. 3d at 470, 668 P.2d at 714, 194 Cal. Rptr. at 407.

137. *Id.*

138. *Id.*

139. *Id.* The inference drawn from the negative pregnant construction of Penal Code Section 192 suggested that the Code Commission had intended to provide for a felony-murder rule in another statute, but did not suggest *which* statute that was. *Id.* The *Sanchez* excerpt offered by the Attorney General as evidence of a Code Commission belief that Penal Code Section 189 embodied the felony-murder rule was inadequate evidence of which statute was believed by the Code Commission to codify the felony-murder rule because the supreme court previously had rejected *Sanchez* as direct evidence that section 189 codified the doctrine. *Id.* at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406. Only after other evidence had been provided by the Attorney General to suggest that the Code Commission intended to provide for the first degree felony-murder rule in section 189 was the *Sanchez* excerpt accepted by the court as evidence in support of that proposition. *Id.* at 471, 668 P.2d at 714-15, 194 Cal. Rptr. at 408.

140. CAL. PENAL CODE ANN. §455, Code Com. note (1872).

141. *Id.*

142. 1856 Cal. Stat., c. 110, §5, at 132 (defining arson).

143. CAL. PENAL CODE ANN. §455, Code Com. note (1872).

murder because that language duplicated the function of section 189.¹⁴⁴ Combined with the prior inferences presented by the Attorney General which suggested that the Code Commission intended to codify the first degree felony-murder rule somewhere in the Penal Code, this evidence supported the inference that the doctrine was codified in section 189.¹⁴⁵

Acknowledging the decision to be a close call, the supreme court sided with the Attorney General, holding that section 189 codifies the first degree felony-murder rule.¹⁴⁶ The court came to this conclusion because evidence had been provided from collateral sources that indicated legislative intent to codify the first degree felony-murder rule in that statute.¹⁴⁷ The express language of section 189 was not considered by the court in reaching its holding.¹⁴⁸ The court, in fact, rejected the language of section 189 as determinative of legislative intent to codify the doctrine.¹⁴⁹ Nonetheless, the *Dillon* court emphasized the absence of express language in the Penal Code concerning second degree felony-murder when declaring in dictum, that the second degree felony-murder rule is uncoded common law.¹⁵⁰ The court cited *People v. Phillips* as the authority for this characterization of the second degree felony-murder doctrine.¹⁵¹ As will be shown, however, *People v. Phillips* is authority only for the proposition that the second degree felony-murder rule has no *express* basis in the Penal Code. *Phillips* is not dispositive of the issue whether the second degree felony-murder rule was *intended* to be codified in the Penal Code.

144. 34 Cal. 3d at 471, 668 P.2d at 714, 194 Cal. Rptr. at 407.

145. *Id.*

146. *Id.* at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408.

147. The collateral sources had been the *Sanchez* opinion excerpt included in the Code Commission note to Penal Code Section 189, the negative pregnant construction of Penal Code Section 192, and the Code Commission note to Penal Code Section 455. No other evidence of legislative intent to codify the first degree felony-murder rule in Penal Code Section 189 was provided by the Attorney General. 34 Cal. 3d at 468-71, 668 P.2d at 713-15, 194 Cal. Rptr. at 406-08. "[T]he evidence of present legislative intent *thus identified by the Attorney General* is sufficient...[to require the court] to construe section 189 as a statutory enactment of the first degree felony-murder rule in California." (emphasis added). *Id.* at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408.

148. *Id.* at 468-71, 668 P.2d at 713-15, 194 Cal. Rptr. at 406-08. See *supra* note 147 and accompanying text.

149. The supreme court acknowledged that section 189 was based on amended section 21 of the 1856 "Act concerning Crimes and Punishments" and that the language of the two statutes were nearly identical. 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405. See *supra* text accompanying notes 96-97. The language of amended section 21 was expressly rejected by the *Dillon* court as codifying the crime of felony-murder. *Id.* at 469, 471, 668 P.2d at 713, 714-15, 194 Cal. Rptr. at 406, 408. No material change in the language of amended section 21 was intended upon enactment of section 189. CAL. PENAL CODE ANN. §189, Code Com. note (1872). See 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

150. 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

151. *Id.*

As a result, an argument can be made that is very similar to the one accepted by the court in *Dillon* when holding the first degree felony-murder rule to be codified in section 189 that the 1872 legislature also intended to codify the second degree felony-murder rule in section 189.

People v. Phillips - NOT DISPOSITIVE

The issue raised in *Phillips* was whether the second degree felony-murder rule could be applied despite the lack of an express basis in the Penal Code for the doctrine.¹⁵² The supreme court in *Phillips* acknowledged that no express language codifying the second degree felony murder-rule appears in the Penal Code,¹⁵³ but applied the rule nonetheless, declaring that "the concept lies imbedded in [California] law."¹⁵⁴ The *Phillips* court cited *People v. Williams*¹⁵⁵ and *People v. Ford*¹⁵⁶ as precedent for the holding that "the perpetration of some felonies, exclusive of those enumerated in Penal Code section 189, may provide the basis for a murder conviction under the felony-murder rule."¹⁵⁷ This is as far as the *Phillips* court delves into the issues whether the second degree felony-murder rule is codified in the Penal Code. No reason is offered by the court to explain why *Williams* or *Ford* authorizes application of the second degree felony-murder doctrine.¹⁵⁸ The *Williams* and *Ford* decisions also contain no explanation.¹⁵⁹ In those cases the court, as in *Phillips*, relies upon stare decisis as authority for applying the second degree felony-murder rule.¹⁶⁰ Statutory authority authorizing application of the rule was not cited.¹⁶¹

152. 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232.

153. *Id.*

154. *Id.*

155. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).

156. 60 Cal. 2d 772, 388 P.2d 892, 36 Cal. Rptr. 620 (1964).

157. 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232.

158. The court appeared to rely on *Williams* and *Ford* as the latest precedent reaffirming a history of decisions authorizing application of the second degree felony-murder rule. See *supra* note 22 and accompanying text.

159. See *Williams*, 63 Cal. 2d at 457, 406 P.2d at 649-50, 47 Cal. Rptr. at 9-10; *Ford*, 60 Cal. 2d at 795, 388 P.2d at 907-08, 36 Cal. Rptr. at 635-36.

160. In *Williams*, the supreme court quoted the formulation developed in *Ford*, "A homicide that is a direct casual result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Penal Code §189) constitutes at least second degree murder," as authority for applying the second degree felony-murder rule. 63 Cal. 2d at 457, 406 P.2d at 649, 47 Cal. Rptr. at 9. In *Ford*, the court cited *Poindexter*, 51 Cal. 2d at 149, 330 P.2d at 767; *Powell*, 34 Cal. 2d at 205, 208 P.2d at 205; and *People v. McIntyre*, 213 Cal. 50, 56, 1 P.2d 443, 445 as support for the formulation. 60 Cal. 2d at 705, 388 P.2d at 907, 36 Cal. Rptr. at 635.

161. See *supra* note 160 and accompanying text.

What is important to note about the *Phillips*, *Williams*, and *Ford* cases, and every supreme court decision to date regarding the second degree felony-murder rule, is the lack of judicial inquiry into whether the legislature intended to codify the second degree felony-murder rule in section 189.¹⁶² The inquiry has been unnecessary primarily because the court has relied exclusively upon *Phillips* and similar cases that authorize application of the second degree felony-murder rule without concern for an express statutory basis for the doctrine.¹⁶³ As a consequence, the issue of whether the legislature intended to codify the second degree felony-murder doctrine in section 189 has not been decided by the supreme court. That issue must be decided before judicial abrogation of the second degree felony-murder rule can occur because legislative intent to codify the doctrine will prevent judicial abolition of the rule.¹⁶⁴ This is the teaching of *Dillon*. In that case, no express statutory language was accepted by the court as directly codifying the first degree felony-murder rule, yet proof of legislative intent to codify the doctrine prevented the court from abolishing the rule.¹⁶⁵ If a similar legislative intent to codify the second degree felony-murder rule in the Penal Code can be proved, the court seemingly will be precluded from abrogating the doctrine by the same separation of powers barrier that blocked court abolition of the first degree felony-murder rule in *Dillon*.¹⁶⁶ Evidence of legislative intent to codify the second degree felony-murder rule in section 189 is provided by the *Dillon* analysis.

THE *Dillon* ANALYSIS—THE CASE FOR A STATUTORY SECOND DEGREE FELONY-MURDER RULE

The *Dillon* analysis is comprised of four components. The first is the excerpt from the *Sanchez* opinion reproduced in the explanatory

162. See *supra* note 22 and accompanying text.

163. See *supra* note 22 and accompanying text. See also *People v. Nichols*, 3 Cal. 3d 159, 163, 474 P.2d 673, 681, 89 Cal. Rptr. 721, 729 (1970) (citing *Ford*). The second degree felony-murder rule may be applied regardless of express statutory authorization for the doctrine in the capacity as a common-law determinant of the malice aforethought element of murder imposed by Penal Code section 187. See generally LAFAYE & SCOTT, *supra* note 7, at 528 (listing the felony-murder doctrine as a species of malice recognized at common law and as existing in most American jurisdictions); PERKINS, *supra* note 52, at 58-72 (same); CAL. PENAL CODE §188 (defining the term "malice" as used in Penal Code section 187).

164. See *supra* notes 11 and 16 and accompanying text. The constitutionality of a statutory felony-murder rule was determined in *Dillon*. 34 Cal. 3d at 476, 668 P.2d at 718, 194 Cal. Rptr. at 411.

165. 34 Cal. 3d at 463, 472, 668 P.2d at 709, 715, 194 Cal. Rptr. at 402, 408.

166. *Id.* See *supra* notes 11, 16 and 164 and accompanying text.

note to section 189.¹⁶⁷ The second is the negative pregnant construction of the present manslaughter statute, section 192.¹⁶⁸ The explanatory note to section 192 in which section 25 of the 1850 Act is credited as embodied in the present manslaughter statute¹⁶⁹ serves as the third component of the *Dillon* analysis. The fourth is the explanatory note to the arson statute, section 455,¹⁷⁰ in which section 189 is characterized as codifying arson felony-murder. Each component evidences an intent by the 1872 Code Commission to codify some degree of the felony-murder rule in the 1872 Penal Code. In the aggregate, the components combine to form a persuasive argument that second degree felony-murder was intended to be codified in Penal code section 189.

The first component of the *Dillon* analysis, the *Sanchez* opinion excerpt, was accepted by the court in *Dillon* as evidence that the Code Commission believed section 189 to embody the first degree felony-murder rule.¹⁷¹ The same excerpt contains evidence that the Code Commission believed section 189 also to embody the second degree felony-murder rule. The *Sanchez* excerpt provided in part:

In dividing murder into two degrees, the legislature intended to assign to the first, as deserving greater punishment, all murders of a cruel and aggravated character; and to the second, all other kinds of murder which are murder at common law;...¹⁷²

The Fifth District Court of Appeal of California recently accepted this language as evidence of an understanding by the 1872 legislature that Penal Code section 189 codified the second degree felony-murder rule.¹⁷³ In *People v. Taylor*,¹⁷⁴ the defendant appealed from a conviction of second degree felony-murder in which the furnishing of heroin was the underlying felony. The defendant made an argument similar to the one made by the defendant in *Dillon*, positing that his conviction for second degree felony-murder could not stand because no statutory authority existed for the crime.¹⁷⁵ The prosecution argued that section 189 embodied the second degree felony-murder rule and offered as support the explanatory note to section 189, in-

167. CAL. PENAL CODE §189, Code Com. note (1872).

168. CAL. PENAL CODE §192. See 34 Cal. 3d at 469-70, 668 P.2d at 713-14, 194 Cal. Rptr. at 406-07. See also *supra* note 40 and accompanying text.

169. CAL. PENAL CODE ANN. §192, Code Com. note (1872).

170. CAL. PENAL CODE ANN. §455, Code Com. note (1872).

171. 34 Cal. 3d at 471, 668 P.2d at 714-15, 194 Cal. Rptr. at 408.

172. CAL. PENAL CODE ANN. §189, Code Com. note (1872).

173. *People v. Taylor*, 112 Cal. App. 3d 348, 356-57, 169 Cal. Rptr. 290, 294-95 (1980).

174. *Id.*

175. *Id.*

cluding the *Sanchez* excerpt quoted above.¹⁷⁶ The appellate court in *Taylor* held for the prosecution, stating that "[t]he Legislature intended by Penal Code section 189 to define second degree murder and to include therein felony-murder."¹⁷⁷ The *Taylor* court noted that one form of murder at common law was second degree felony-murder.¹⁷⁸ Using this common-law knowledge as a proper source of interpretation of the term "murder" found in Penal Code section 189,¹⁷⁹ the *Taylor* court concluded that the legislature intended for section 189 to embody second degree felony-murder.¹⁸⁰ The language from the *Sanchez* excerpt "[second degree murder embodies] all other kinds of murder which are murder at common law..." was quoted by the court as support for the holding.¹⁸¹

Taylor appears to be the only reported case in which a California court has passed on the issue whether the 1872 legislature intended to codify second degree felony-murder in Penal Code section 189.¹⁸² The *Taylor* decision was denied certiorari by the California Supreme Court;¹⁸³ therefore, *Taylor* is the leading authority on whether a Penal Code basis exists for second degree felony-murder.¹⁸⁴ *Taylor* cannot be considered strong authority for the proposition that Penal Code section 189 codifies the second degree felony-murder rule, however. Reliance by *Taylor* upon the *Sanchez* excerpt as direct evidence of the way in which section 189 codifies the second degree felony-murder doctrine is misplaced. In *Dillon*, the supreme court rejected the *Sanchez* excerpt as direct evidence that section 189 embodies the felony-murder rule.¹⁸⁵ Only after the other prongs of the argument advanced by the Attorney General in *Dillon* were established did the court accept the *Sanchez* excerpt as evidence of a Code Commission belief that Penal Code section 189 codified the first degree felony-murder rule.¹⁸⁶ The *Dillon* decision teaches, therefore, that the *Sanchez* ex-

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See *supra* notes 22 and 163 and accompanying text. See also *supra* note 158 and accompanying text.

183. 112 Cal. App. 3d at 348, 169 Cal. Rptr. at 290.

184. Although the denial of a hearing by the supreme court of a lower court decision is not necessarily an approval of that decision, the appellate decision is considered, nonetheless, the leading authority on the issues therein decided to the extent that it does not conflict with current supreme court holdings. See *DiGenova v. State Board of Education*, 57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962); *Cole v. Rush*, 45 Cal. 2d 345, 352, 289 P.2d 450, 453 (1955).

185. 34 Cal. 3d at 469, 471, 668 P.2d at 713, 714-15, 194 Cal. Rptr. at 406, 408.

186. *Id.* at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

cerpt cannot serve as *direct* evidence that section 189 codifies any degree of the felony-murder rule, but the excerpt can serve as evidence of a Code Commission *belief* that Penal Code section 189 codified the first degree felony-murder rule. This author asserts, however, that the *Sanchez* excerpt is capable of evidencing a Code Commission belief that section 189 codified the second degree felony-murder rule.

The appellate court in *Taylor* has shown how the *Sanchez* excerpt can be misconstrued as being direct evidence that section 189 embodies the second degree felony-murder rule.¹⁸⁷ The Code Commission possibly could have construed the *Sanchez* excerpt in the same manner. Consequently, the *Sanchez* excerpt is evidence of a Code Commission belief that section 189 codified the second degree felony-murder rule despite that excerpt having been rejected as direct evidence of the felony-murder rule being codified in section 189. In *Dillon*, the court considered "immaterial" the misreading by the Code Commission of the *Sanchez* excerpt as direct evidence that the *first* degree felony-murder rule was codified by section 189.¹⁸⁸ This misreading was accepted, however, as evidence of a Code Commission belief that section 189 embodied the first degree felony-murder rule.¹⁸⁹ No different treatment should be made of an assertion that the Code Commission misinterpreted the *Sanchez* excerpt as being direct evidence of section 189 codifying the *second* degree felony-murder rule. By analogy to *Dillon*, the misinterpretation should be considered immaterial and the evidence capable of supporting an inference that the Code Commission believed that section 189 codified the second degree felony-murder rule.

The Attorney General in *Dillon* offered no proof that the Code Commission actually misinterpreted the *Sanchez* excerpt.¹⁹⁰ Only after other evidence was presented independently suggesting that the Code Commission intended section 189 to codify the first degree felony-murder rule did the supreme court accept the *Sanchez* excerpt as additional evidence of that intent.¹⁹¹ Additional evidence is needed, therefore, that independently suggests a Code Commission intent to codify the second degree felony-murder rule in section 189 before the *Sanchez* excerpt may be considered of any persuasive value in support of a finding that the second degree felony-murder rule is codified in section 189. The *Dillon* analysis provides this independent evidence.

187. 112 Cal. App. 3d at 356-57, 169 Cal. Rptr. at 294-95.

188. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

189. *Id.*

190. See *supra* note 132 and accompanying text.

191. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

The second component of the *Dillon* analysis, the negative pregnant construction of the present manslaughter statute, section 192, provides independent evidence of an intent by the Code Commission to codify the second degree felony-murder rule in an unspecified provision of the Penal Code. The pivotal language of section 192 defines the crime of involuntary manslaughter and reads as follows: "[Involuntary Manslaughter] is the unlawful killing of a human being, without malice,...in the commission of an unlawful act, *not amounting to a felony*"¹⁹² (emphasis added). The Attorney General successfully argued in *Dillon* that this language should be read as a negative pregnant evidencing an intent by the Code Commission to provide for a felony-murder rule in another statute.¹⁹³ What should be noted, however, is that the negative pregnant construction of section 192 is not limited to evidencing an intent by the Code Commission to provide *only* for a first degree felony-murder rule. The inference generated by the construction of section 192 is that a killing occurring, without malice, in the commission of *any* felony, including a felony that could support only a second degree felony-murder conviction, had been provided for by the Code Commission in another statute.¹⁹⁴ The language of the *Dillon* decision supports this conclusion. The court describes the inference generated by the suggestive construction of section 192 as evidencing an intent by the Code Commission to provide for a

192. CAL. PENAL CODE §192.

193. 34 Cal. 3d at 469-70, 668 P.2d at 713-14, 194 Cal. Rptr. at 406-07 See *supra* notes 136-38, 146 and accompanying text. See also *supra* note 147.

194. Prior to the enactment of the Penal Code in 1872, section 25 of the 1850 "Act concerning Crimes and Punishments" codified both first and second degree felony-murder. See *Doyell*, 48 Cal. at 94-95; 34 Cal. 3d at 465-67, 668 P.2d at 711-12, 194 Cal. Rptr. at 404-05. Penal Code Section 192 was based, in part, on section 25 of the repealed 1850 Act. CAL. PENAL CODE ANN. §192, Code Com. note (1872). See *infra* text accompanying note 203. The *Dillon* court accepted the negative pregnant construction of Penal Code Section 192 as evidence of legislative intent to codify the first degree felony-murder rule in another statute of the Penal Code. 34 Cal. 3d at 470, 471, 668 P.2d at 714, 715, 194 Cal. Rptr. at 407, 408. No language in Penal Code section 192 or the Code Commission note to the 1872 version of that statute suggests that the Code Commission intended to provide only for the first degree felony-murder rule, or intended to abrogate the second degree felony-murder rule. See *supra* note 135; CAL. PENAL CODE ANN. §192, Code Com. note (1872). Without express language in a statute or clear legislative intent manifested in another manner indicating that only one half of the felony-murder doctrine which had existed since 1850 was to be provided for in the Penal Code, the better inference to be drawn from the negative pregnant construction of section 192 is that the Code Commission intended to provide for the felony-murder rule in another statute as it existed before enactment of the Penal Code. See generally CAL. PENAL CODE §5 (instructing that Penal Code provisions that are "substantially the same as existing statutes must be construed as continuation of those existing statutes"); *Los Angeles Co. v. Frisbie*, 19 Cal. 2d 634, 644 (1942) (established law should not be presumed overthrown by the enactment of statutes without a clear expression of legislative intent to that effect); *accord*, *Theodor v. Superior Court*, 8 Cal. 3d 77, 92, 501 P.2d 234, 245, 104 Cal. Rptr. 226, 237 (1972).

“felony-murder rule” unrestricted by degree.¹⁹⁵ Accordingly, the *Dillon* court accepted the negative pregnant construction of section 192 as evidence of a Code Commission intent to provide for the felony-murder rule.¹⁹⁶ Absent evidence of a Code Commission intent to provide *only* for a first degree felony-murder rule, the inference generated by the negative pregnant construction of section 192 suggests that the Code Commission intended to provide for the second degree felony-murder rule in another statute as well as the first degree felony-murder rule.¹⁹⁷ Neither rule is excluded by the inference, therefore, both rules are implicated because both are legitimate forms of the felony-murder rule. If the Code Commission intended to provide only for the first degree felony-murder rule when drafting the 1872 Penal Code, proof of that intent must be provided by evidence other than the negative pregnant construction of section 192.

At this point, two components of the argument offered by the Attorney General in *Dillon* which persuaded the court to hold that the 1872 legislature intended to codify the first degree felony-murder rule in Penal Code section 189, the *Sanchez* excerpt and the negative pregnant construction of section 192, have been shown to evidence with equal force an intent by the Code Commission to codify the second degree felony-murder rule in the Penal Code. An additional piece of evidence is available that was not emphasized by the Attorney General in *Dillon* which also suggests an intent to codify the second degree felony-murder rule. This evidence is the third component of the *Dillon* analysis and is found in the Code Commission note to the present manslaughter statute, section 192.

The third component of the *Dillon* analysis is the explanatory note offered by the Code Commission to section 192 wherein section 25 of the 1850 Act is credited as a basis for section 192.¹⁹⁸ Section 25, discussed earlier, declared any killing accompanied by a felonious intent to be murder.¹⁹⁹ The statute made no distinction between those felonies capable of supporting a first degree murder conviction and

195. The court stated:

The Attorney General apparently contends the quoted phrase should also be read as a negative pregnant implying that the commission had elsewhere affirmatively provided for a corresponding *felony-murder rule*...The inference is not unreasonable but the question remains: which other statute was believed by the commission to codify the *felony-murder rule*? (emphasis added).

34 Cal. 3d at 470, 668 P.2d at 714, 194 Cal. Rptr. at 407.

196. *Id.* at 470-72, 668 P.2d at 714-15, 194 Cal. Rptr. at 407-08.

197. *See supra* note 194 and accompanying text.

198. CAL. PENAL CODE ANN. §192, Code Com. note (1872).

199. 1850 Cal. Stat., c.99, §25, at 220. *See supra* note 105 and accompanying text; 34 Cal. 3d at 465-67, 668 P.2d at 711-12, 194 Cal. Rptr. at 404-05.

those capable of supporting a second degree murder conviction.²⁰⁰ Any felonious intent coupled with a killing was declared to be murder by section 25.²⁰¹ Accordingly, section 25 was interpreted by the California Supreme Court as codifying the second degree felony-murder rule.²⁰² The explanatory note to Penal Code section 192 reads in pertinent part: "This section embodies the material portions of Section 22, 23, 24, and 25 of the Crimes and Punishments Act of 1850."²⁰³ The *Dillon* court noted that no change in the meanings of the 1850 sections embodied by section 192 was intended upon enactment of the Penal Code.²⁰⁴ Assuming that the felony-murder provision of section 25 was a material part of that statute, section 192 appears based upon, in part, the felony-murder rule. Section 25 was interpreted as codifying the second degree felony-murder rule; consequently, the Code Commission appears to have intended section 192 to embody that doctrine.²⁰⁵

A major problem derogating the persuasiveness of this evidence of a Code Commission intent to codify the second degree felony-murder rule in section 192 is the omission from that section of the felony-murder language that characterized section 25 of the 1850 Act.²⁰⁶ Section 192 expressly limits the definition of manslaughter to killings, without malice, in the commission of all unlawful acts *except* felonies.²⁰⁷ The language of section 192, therefore, appears unable to be construed as codifying any form of felony-murder. The significance of this omission from section 192 of the felony-murder language of section 25 of the 1850 Act was addressed by the court in *Dillon* when the defendant in that case offered that omission as evidence of an intent by the 1872 legislature to abrogate the felony-murder rule.²⁰⁸ The court implicitly rejected this omission as evidence

200. See 1850 Cal. Stat. c. 99, §25, at 220. See *supra* note 105 and accompanying text.

201. 1850 Cal. Stat., c. 99, §25, at 220. See 34 Cal. 3d at 466, 668 P.2d at 711, 194 Cal. Rptr. at 404; *Doyell*, 48 Cal. at 94.

202. See *Doyell*, 48 Cal. at 94-95 (homicide during the commission of a felony not listed in amended section 21 of the 1850 "Act concerning Crimes and Punishments" held to be second degree murder); *accord, Olsen*, 80 Cal. at 127 (citing *Doyell* as support for a second degree felony-murder conviction based on the felony of grand larceny). See *generally* 34 Cal. 3d at 466-67, 668 P.2d at 711-12, 194 Cal. Rptr. at 404-05 (citing *Doyell*).

203. CAL. PENAL CODE ANN., §192, Code Com. note (1872).

204. 34 Cal. 3d at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406.

205. One supreme court decision has credited Penal Code Section 192 as authorizing application of the second degree felony-murder rule. *People v. McIntyre*, 213 Cal. 50, 56, 1 P.2d 443, 445 (1931). *McIntyre* was cited with approval in *Ford*, 60 Cal. 2d at 795, 388 P.2d at 907, 36 Cal. Rptr. at 635.

206. See *supra* note 105.

207. See *supra* note 135.

208. 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405.

of legislative intent to abrogate the felony-murder doctrine by holding the first degree felony-murder rule to be codified in section 189.²⁰⁹ This decision appears to be a compromise interpretation of the contradictory inferences generated by the Code Commission note to section 192 which credits that statute as embodying the felony-murder rule, and the deletion of the felony-murder language of former section 25 from section 192. Section 192, while not credited by the court in *Dillon* as the statutory basis for first degree felony-murder,²¹⁰ was accepted as evidence of legislative intent to codify felony-murder in another statute because it was constructed as a negative pregnant.²¹¹ For purposes of this comment, the value of the explanatory note to section 192 appears to have been modified by the *Dillon* decision. Although the Code Commission expressly credited section 192 as embodying the felony-murder rule, the court in *Dillon* interpreted that code section as evidencing only an intent by the Code Commission to codify the felony-murder rule in another statute.²¹²

The Attorney General in *Dillon* faced a similar situation. Having produced evidence of legislative intent to codify the first degree felony-murder rule,²¹³ the state was required to show which statute was believed by the Code Commission to embody the rule.²¹⁴ The production of this evidence persuaded the court to hold that the first degree felony-murder rule had been intended by the 1872 legislature to be codified in section 189.²¹⁵ This author has furnished evidence which suggests that the Code Commission intended to provide for a second degree felony-murder rule in the Penal Code. This evidence is the same as that accepted by the court in *Dillon* as proof of legislative intent to codify the first degree felony-murder rule.²¹⁶ Ad-

209. *Id.* at 471-72, 668 P.2d at 715, 194 Cal. Rptr. at 408.

210. *Id.* at 469, 472, 668 P.2d at 713, 715, 194 Cal. Rptr. at 406, 408.

211. *Id.* at 470, 472, 668 P.2d at 713-14, 715, 194 Cal. Rptr. at 406-07, 408.

212. *Id.* The *Dillon* court acknowledged that section 192 embodied the former felony-murder rule codified by repealed section 25 of the 1850 "Act concerning Crimes and Punishments." 34 Cal. 3d at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406. The court, however, after accepting the argument that section 189 codified the first degree felony-murder rule, did not re-address the significance of the Code Commission note which credited section 192 as embodying the felony-murder rule. 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408. The supreme court apparently believed that the Code Commission, by constructing section 192 as a negative pregnant, channelled any intent to codify the felony-murder rule in section 192 to section 189. *Id.* at 469-72, 668 P.2d at 713-15, 194 Cal. Rptr. at 406-08.

213. That evidence was the *Sanchez* opinion excerpt included in the Code Commission note to section 189 of the 1872 Penal Code, and the negative pregnant construction of section 192. 34 Cal. 3d at 468-70, 668 P.2d at 713-14, 194 Cal. Rptr. at 406-07.

214. *Id.* at 470, 668 P.2d at 714, 194 Cal. Rptr. at 407. See *supra* note 195.

215. 34 Cal. 3d at 471-72, 668 P.2d at 715, 194 Cal. Rptr. at 408.

216. The *Sanchez* opinion excerpt included in the Code Commission note to Penal Code Section 189 was offered by the Attorney General in *Dillon* as evidence of a Code Commission

ditional evidence of an intent by the Code Commission to provide for the second degree felony-murder rule in the Penal Code is the embodiment of the felony-murder provision of the 1850 Act, section 25, in section 192.²¹⁷ No greater proof than that required of the Attorney General in *Dillon*, therefore, should be required of the proponent seeking to prove that the second degree felony-murder rule was intended by the legislature to be codified in section 189. In *Dillon*, persuasive evidence of legislative intent to codify the first degree felony-murder rule in section 189 was provided by the Code Commission note accompanying section 455.²¹⁸ The same note provides proof that the legislature also intended to codify the second degree felony-murder rule in section 189.

The Code Commission note to section 455²¹⁹ is the fourth component of the *Dillon* analysis. This note explains that the special felony-murder provision of the repealed arson section of the 1850 Act, section 5, was not adopted into the Penal Code. The note characterizes the omitted felony-murder provision as "surplusage" because section 189 already codified the felony-murder rule for the underlying felony of arson.²²⁰ The court in *Dillon* accepted this note as evidence of which statute was believed by the Code Commission to codify the first degree felony-murder rule.²²¹ This last piece of evidence, combined with the other inferences presented by the Attorney General, persuaded the court to hold that the legislature intended to codify the felony-murder rule for the felonies listed in section 189.²²² The logic of the Attorney General appears to have been that because arson was one of the four felonies listed by section 189 in 1872, and because arson felony-murder was believed by the Code Commission to be codified in section 189, the Code Commission believed the felony-murder rule to be codified for each felony listed in section 189.²²³

belief that Penal Code Section 189 codified the first degree felony-murder rule. *Id.* at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406. The same excerpt has been shown to evidence a belief by the Code Commission that Penal Code Section 189 codified the second degree felony-murder rule. *See supra* notes 171-91 and accompanying text. The negative pregnant construction of Penal Code Section 192 was offered by the Attorney General as evidence of a Code Commission intent to provide for the felony-murder rule in another statute of the Penal Code. 34 Cal. 3d at 469-70, 668 P.2d at 714, 194 Cal. Rptr. at 407. The same negative pregnant construction has been shown to evidence an intent by the Code Commission to provide for a second degree felony-murder rule in another penal statute. *See supra* notes 194-95 and accompanying text. *See also supra* notes 196-97, and accompanying text.

217. *See supra* notes 198-212 and accompanying text.

218. 34 Cal. 3d at 470-71, 668 P.2d at 714-15, 194 Cal. Rptr. at 407-08.

219. CAL. PENAL CODE ANN. §455, Code Com. note (1872).

220. *See supra* note 143 and accompanying text.

221. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

222. *Id.* at 471-72, 668 P.2d at 715, 194 Cal. Rptr. at 408.

223. *Id.* at 471, 668 P.2d at 714, 194 Cal. Rptr. at 407.

The supreme court accepted this logic, but refused to hold that the Code Commission intended to codify the felony-murder rule for any felonies other than those listed in section 189.²²⁴ The court emphasized this limitation by adding, via dictum, that the second degree felony-murder rule was unaffected by the holding in *Dillon* and remained uncodified common law.²²⁵ By attaching this limitation to the *Dillon* decision, the court moved without explanation²²⁶ from the position advocated by the Attorney General that section 189 codifies the first degree felony-murder rule to the markedly distinct position that section 189 codifies *only* the first degree felony-murder rule. The supreme court emphasized that the *listing* of felonies in section 189 evidenced the extent to which the Code Commission believed that statute codified the felony-murder rule.²²⁷ Section 189 only lists felonies that trigger first degree murder punishment;²²⁸ therefore, the supreme court held, in effect, that the Code Commission only intended to codify the first degree felony-murder rule.²²⁹ The assumption, however, that the enumeration of felonies in section 189 evidences the *extent* to which the Code Commission believed that section 189 codified felony-murder is unsupported by the court in *Dillon*²³⁰ and finds no support in the history of that section.

The primary purpose behind the enumeration of felonies by the Code Commission in section 189 was to distinguish first degree murder from second degree murder.²³¹ The Code Commission expressly credited section 189 as being modelled after the Pennsylvania statute of 1794²³² which has been interpreted solely as a degree-setting device for murder.²³³ Within the explanatory note accompanying section 189²³⁴

224. *Id.*

225. *Id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

226. *Id.*; see *supra* note 22 and accompanying text.

227. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

228. See *supra* notes 59-60 and accompanying text.

229. The holding in *Dillon* that the 1872 legislature intended to codify the felony-murder rule for the felonies listed in Penal Code Section 189, when coupled with the dictum of *Dillon* that the second degree felony-murder rule remains judge-made law without express basis in the Penal Code, supports this conclusion. See 34 Cal. 3d at 470-71, 472 n.19, 668 P.2d at 715, 715 n.19, 194 Cal. Rptr. at 408, 408 n.19; see *supra* note 34 and accompanying text.

230. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408. *

231. CAL. PENAL CODE ANN. §189, Code Com. note (1872); *Mattison*, 4 Cal. 3d at 182, 481 P.2d at 196, 93 Cal. Rptr. at 188. See generally *Doyell*, 48 Cal. at 94-95 (analyzing amended section 21 of the 1850 "Act concerning Crimes and Punishments" from which Penal Code Section 189 was derived without material change intended. See *supra* notes 96-101 and accompanying text).

232. CAL. PENAL CODE ANN. §189, Code Com. note (1872).

233. *Commonwealth v. Redline*, 137 A.2d 472, 476 (1958); *Commonwealth ex rel Smith v. Meyers*, 261 A.2d 550, 553 (1970).

234. CAL. PENAL CODE ANN. §189, Code Com. note (1872).

is the *Sanchez* opinion excerpt that was included by the Code Commission to explain the degree-setting function of section 189.²³⁵ The *Dillon* court held that the *Sanchez* excerpt is evidence that the Code Commission believed section 189 to codify the first degree felony-murder rule.²³⁶ The court, however, did not hold that the *Sanchez* excerpt was evidence that the Code Commission believed section 189 to codify *only* first degree felony-murder.²³⁷ The legislative history of section 189, therefore, offers no evidence that the listing of felonies in that statute was intended by the Code Commission to limit the codification of the felony-murder rule. Additionally, when the construction of section 189 is viewed primarily as functioning to set the degree for murder, the likelihood that the Code Commission would have enumerated felonies capable of supporting a second degree felony-murder conviction in that statute appears remote. Section 189 was created in recognition of the varying degree of "atrociousness" involved in different instances of murder.²³⁸ The statute lists those occasions of murder considered the most reprehensible to society and deemed by the legislature as deserving of first degree punishment.²³⁹ No instance of murder is listed unless deserving of first degree punishment. The language of section 189 which reads "and all other kinds of murder are of the second degree" uniformly labels every kind of murder not listed as second degree murder.²⁴⁰ Consequently, the court should not look to what felonies are enumerated in section 189 when deciding the extent to which the felony-murder rule is codified by that statute because the Code Commission had no reason to list any felony capable of supporting a second degree felony-murder conviction in section 189. Second degree felony-murder, being a species of second degree murder, would be provided for in the catch-all clause "and all other kinds of murder are of the second degree".²⁴¹ Enumeration of felonies capable of supporting a second degree felony-murder conviction, therefore, would have been unnecessary and completely

235. See 34 Cal. 3d at 469, 668 P.2d at 713, 194 Cal. Rptr. at 406.

236. *Id.* at 471, 668 P.2d at 714-15, 194 Cal. Rptr. at 408.

237. The court labeled the *Sanchez* excerpt as evidence of a Code Commission belief that section 189 embodied the felony-murder rule and did not limit *Sanchez* to evidence only a Code Commission belief that section 189 codified first degree felony-murder. *Id.*

238. See CAL. PENAL CODE ANN., §189, Code Com. note (1872).

239. *Id.*; accord, 34 Cal. 3d at 468, 468 n.15, 668 P.2d at 713, 713 n.5, 194 Cal. Rptr. at 406, 406 n.15. See generally *Doyell*, 48 Cal. at 94-95 (amended section 21 interpreted as a degree-setting device for murder).

240. CAL. PENAL CODE §189. See *supra* text accompanying note 83; Fletcher, *supra* note 73, at 421.

241. *Taylor*, 112 Cal. App. at 356-57, 169 Cal. Rptr. at 294-95. See *supra* notes 177-81 and accompanying text; Pike, *supra* note 73, at 118.

at odds with the construction of section 189 which lists only those murder situations deserving of first degree punishment. The *Dillon* court, however, characterized the enumeration of felonies in section 189 as indicative of the extent of the intent of the Code Commission to codify the felony-murder rule.²⁴² No support was offered for that position.²⁴³ Moreover, no support has been found in the history or construction of section 189 except evidence suggesting that the enumeration of felonies was intended by the Code Commission to serve as a means to distinguish first degree from second degree murder and to codify the felony-murder rule for the listed felonies. The listing of felonies in section 189, therefore, is not necessarily evidence of a Code Commission intent to limit the codification of the felony-murder rule by that statute. As a result, the explanatory note to section 455 is able to serve as evidence of which statute was believed by the Code Commission to codify the second degree felony-murder rule.

The explanatory note to section 455 indicates that the Code Commission believed that section 189 codified the felony-murder rule for the underlying felony of arson.²⁴⁴ The note provides direct evidence of a belief by the Code Commission that Penal Code section 189 codified one form of the felony-murder rule.²⁴⁵ This evidence that the Code Commission understood one form of the felony-murder rule to be codified in section 189 combines with the inferences provided by the previously discussed components of the *Dillon* analysis to cement the argument that the second degree felony-murder rule was intended to be codified in section 189. This argument is very similar to and as persuasive as the argument made by the Attorney General in *Dillon*. The inclusion by the Code Commission of the *Sanchez* opinion excerpt in the explanatory note to section 189 can be construed as evidencing a belief by the Code Commission that section 189 codified the second degree felony-murder rule.²⁴⁶ The negative pregnant construction of section 192 is evidence that the Code Commission intended to codify both degrees of the felony-murder rule in another statute.²⁴⁷ Further evidence of a Code Commission intent to codify both the first and second degree felony-murder rules in the

242. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

243. *Id.*

244. CAL. PENAL CODE ANN. §455, Code Com. note (1872). See *supra* text accompanying note 143.

245. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

246. See *supra* notes 171-81, 187-89 and accompanying text.

247. See *supra* notes 194-95 and accompanying text. See also *supra* notes 196-97 and accompanying text.

Penal Code is provided by the explanatory note to section 192 which credits that statute as embodying the felony-murder provision of the repealed 1850 Act.²⁴⁸ Section 192 is not credited modernly with codifying any form of the felony-murder rule; yet, the embodiment by the statute of the felony-murder section of the repealed 1850 Act would seem to be evidence of an intent by the Code Commission to codify the felony-murder rule.²⁴⁹ Lacking only direct evidence of the statute believed by the Code Commission to codify the second degree felony-murder rule, evidence that that statute was believed by the Code Commission to be section 189 is provided by the explanatory note to section 455. The court in *Dillon* accepted this same note as evidence of a belief by the Code Commission that section 189 codified the felony-murder rule not only for the underlying felony of arson but for the entire first degree felony-murder rule.²⁵⁰ No evidence exists that the Code Commission intended to codify *only* the first degree felony-murder rule in section 189.²⁵¹ The explanatory note to section 455, therefore, operates in the same manner as in *Dillon* to answer the additional question of which statute was believed to codify the second degree felony-murder rule.²⁵² Section 455 provides evidence that the Code Commission believed section 189 to codify one form of the felony-murder rule, and independent evidence suggests that the Code Commission intended to codify the second degree felony-murder rule in an unspecified statute. In the aggregate, the evidence suggests that the Code Commission intended to codify both forms of the felony-murder rule in the same statute: section 189. The Attorney General offered no more proof than has been offered by this author to successfully evidence legislative intent to codify the first degree felony-murder rule in section 189.²⁵³ The conclusion is compelling, therefore, that the second degree felony-murder rule was intended to be codified in section 189.

CONCLUSION

The California Supreme Court held in *Dillon* that the 1872 legislature intended to codify the first degree felony-murder rule in Penal Code

248. See *supra* notes 198-205 and accompanying text.

249. See *supra* notes 206-12 and accompanying text.

250. 34 Cal. 3d at 471, 668 P.2d at 715, 194 Cal. Rptr. at 408.

251. See *supra* notes 230-43 and accompanying text.

252. See 34 Cal. 3d at 470-71, 668 P.2d at 714-15, 194 Cal. Rptr. at 407-08. See also *supra* note 139 and accompanying text.

253. The sum of the proof offered by the Attorney General in *Dillon* consisted of three components found in the four-component *Dillon* analysis: the *Sanchez* excerpt included in the

section 189. The court was persuaded by an offering of proof which consisted exclusively of inferences drawn from sources apart from the express language of section 189. The express language of section 189, moreover, was rejected by the *Dillon* court as directly codifying the felony-murder doctrine. Nonetheless, the *Dillon* court, in dictum, distinguished the second degree felony-murder rule as being judge-made law because no express language exists in the Penal Code for the doctrine. The *Dillon* decision teaches, however, that an express basis for the second degree felony-murder rule in the Penal Code should be an unnecessary prerequisite to codification. Proof of legislative intent to codify the second degree felony-murder rule establishes a statutory basis for the doctrine despite the absence of express statutory language. The supreme court has not passed on the issue whether the legislature intended to codify the second degree felony-murder rule, therefore, the question whether the rule is statutory remains unanswered. In the likely event that the supreme court entertains a request to abolish the second degree felony-murder rule, the court will need to decide, as in *Dillon*, whether the legislature intended to codify the doctrine. Proof of legislative intent to codify the second degree felony-murder rule will preclude judicial abrogation of the rule. This author has demonstrated that evidence which parallels the proof accepted by the supreme court in *Dillon* suggests that the 1872 legislature intended to codify both degrees of the felony-murder rule in Penal Code section 189. Consequently, this author concludes that the second degree felony-murder rule cannot be abolished judicially because the doctrine is codified in Penal Code section 189.

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Code Commission note to Penal Code Section 189, the negative pregnant construction of Penal Code Section 192, and the Code Commission note to Penal Code Section 455. 34 Cal. 3d at 468-71, 668 P.2d at 713-15, 194 Cal. Rptr. at 406-08.

